No. 606

In the Supreme Court of the United States

OCTOBER TERM, 1957

CITY OF TACOMA, PETITIONER

v.

THE TAXPAYERS OF TACOMA, WASHINGTON, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR THE FEDERAL POWER COMMISSION AS AMICUS CURIAE

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v.

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OPINIONS BELOW

The original opinion of the Washington Supreme Court and the addition to the opinion (R. 268–313, 369–71) are reported at 49 Wn. 2d 781.

JURISDICTION

The judgment of the Washington Supreme Court was entered on April 30, 1957 (R. 372–73). A petition for rehearing was denied, and an addition to the opinion was filed on a petition for clarification, on April 30, 1957 (R. 371). By order of Mr. Justice Black dated July 22, 1957 (R. 382), the time for filing a petition for a writ of certiorari was extended to and including September 27, 1957. The petition was

filed on September 27, 1957, and was granted on December 9, 1957 (R. 383). The jurisdiction of this Court rests upon 28 U. S. C. 1257 (3).

QUESTION PRESENTED

The Federal Power Commission issued to the City of Tacoma, a municipal corporation in the State of Washington, a license under the Federal Power Act for the construction and operation of a hydroelectric development on the Cowlitz River. In order to construct the project thus authorized, Tacoma will have to condemn a fish hatchery owned and operated by the State of Washington for public purposes. The main question presented is:

Whether Section 21 of the Federal Power Act, authorizing licensees under the Act to condemn property necessary for the project, vests the requisite power in Tacoma to condemn the fish hatchery, notwithstanding the assertion by the State of Washington that under state law Tacoma lacks power and capacity to condemn such property.

STATUTES INVOLVED

The pertinent provisions of the Federal Power Act, 41 Stat. 1063, *et seq.*, 16 U. S. C. 791, *et seq.*, and of the Washington statutes are set forth in the Appendix, *infra*, pp. 51–58.

STATEMENT

The Federal License. In 1951, the Federal Power Commission granted a license under the Federal Power Act to the City of Tacoma, a municipal corporation in the State of Washington, authorizing it

to construct and operate a hydroelectric project on the Cowlitz River, a tributary of the Columbia River in Washington (R. 27–48). 10 F. P. C. 424–445; 92 P. U. R. (N.S.), 79 ff. Tacoma has owned and operated facilities for the production, transmission and distribution of electric power, under the authority of state law, since 1893 (R. 89–90).

The proposed project, approved by the Federal Power Commission, was to comprise two developments: (1) the Mossyrock development, about 65 miles up the Cowlitz, was to consist of a dam, about 510 feet high, which would create a reservoir extending about 21 miles upstream with a usable storage capacity of 824,000 acre-feet of water, and a powerhouse with an initial installation of three units, each having 75,000 kilowatts of capacity, and provision for a fourth unit of the same capacity; (2) the Mayfield development, about 52 miles from the Cowlitz mouth, was to consist of a dam, about 240 feet high, which would create a reservoir 13½ miles long extending up to the Mossyrock dam, with a usable storage capacity of 21,000 acre-feet and a powerhouse with an initial installation of three units, each with a 40,000 kilowatt capacity, and provision for an additional unit of the same capacity. In the initial installations, the dependable capacity would be about 275,000 kilowatts, with an average annual output of 1,400 million kilowatt hours (R. 29, 40–42, 6–7).

In issuing the license, the Commission dealt at length with the alleged possible threat to the fisheries resources of the Cowlitz River (R. 22–26, 34–38).

While recognizing that state statutes for the protection of fish could not bar the federal program (R. 20), the Commission's order required Tacoma to establish fish ladders, traps and other facilities in cooperation with state and federal agencies (R. 42, 46).[1]

The Commission found that, in addition to providing substantial flood control, navigation, and recreational benefits, the project would assist greatly in alleviating the severe power shortage in the Northwest Region—a matter of national concern—and that none of the projects suggested for construction in lieu of the Cowlitz Project could be constructed as quickly or economically (R. 18–19, 30–34). Thus, the Commission found that the project would be an exceptionally valuable addition to the Northwest power supply because of its size (it will add 190 percent to the present capacity of Tacoma's generating plants and

[1] The facilities contemplated by the Order with respect to the fishery resources would require an initial investment of $9,465,000 and annual expenditures of about $619,000 (R. 38). In addition, the Commission, as special conditions of the license, required that additional studies, tests and experiments of the various fish protective devices be made in cooperation with the United States Fish and Wildlife Service and the Departments of Fisheries and Game of the State of Washington prior to permanent construction of such facilities; that the studies and investigation with respect to the program of stream improvement and hatchery facilities be continued; and that only those facilities as may be prescribed thereafter by the Commission upon its own motion or upon the recommendation of the Secretary of the Interior be constructed (R. 42, 46).

The Commission noted that, while some of the fish handling facilities proposed by Tacoma were novel, there was strong reason to expect that loss could be avoided (R. 22–26, 36–37, 44–45). In any event, it found that the gain from the power facilities would outweigh any loss to the fisheries (R. 38).

nearly 10 percent to the combined total installation in the Pacific Northwest power pool—R. 18, 30–33); location (it is to be on the west side of the Cascade Mountains where the power shortage is most acute and near the densely populated areas of Tacoma, Seattle, and Portland—R. 18–19, 31); and the characteristics of its power output (the diversity of stream flow, due to the Cowlitz's flow being high when the Columbia flow is low, will make large blocks of power available at the regional peak demand, thereby increasing the flexibility of the Northwest power pool—R. 33).

Prior Proceedings. The Washington Departments of Game and Fisheries had opposed the granting of the license before the Commission and, when the Commission granted the license, the Departments sought review in the Court of Appeals for the Ninth Circuit. The Court of Appeals affirmed, ruling that there was ample evidence to support the Commission's findings as to the necessity of the project to alleviate the power shortage, and the effectiveness of the proposed facilities to protect the fish in the Cowlitz River, as well as its conclusion that the Cowlitz Project was best adapted to a comprehensive plan for developing the river. *State of Washington Dept. of Game* v. *Federal Power Commission*, 207 F. 2d 391. Answering the Game and Fisheries Departments' argument that Tacoma, as a creature of Washington, "cannot act in opposition to the policy of the State or in derogation of its laws" (see 207 F. 2d at 396), the Ninth Circuit commented (*ibid.*):

> Again, we turn to the First Iowa case [*First Iowa Coop.* v. *Federal Power Commission*, 328 U. S. 152]. There, too, the applicant for a federal license was a creature of the state and the chief opposition came from the state itself. Yet, the Supreme Court permitted the applicant to act inconsistently with the declared policy of its creator, and to prevail in obtaining a license.[2]

This Court denied certiorari. 347 U. S. 936.

While the Ninth Circuit proceeding was still pending, Tacoma sought in a state court a declaratory judgment as to the validity of a proposed issue of utility revenue bonds to finance the construction of the project, up to the estimated cost of $146,000,000 (R. 1–5).[3] Opposing were the State's Directors of Fisheries and Game, and the court-appointed representatives of the taxpayers of Tacoma (R. 52–56).[3]

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[2] The Ninth Circuit continued (*id.* at 396–97):

> Consistent with the First Iowa case, supra, we conclude that the state laws cannot prevent the Federal Power Commission from issuing a license or bar the licensee from acting under the license to build a dam on a navigable stream since the stream is under the dominion of the United States. However, we do not touch the question as to the legal capacity of the City of Tacoma to initiate and act under the license once it is granted. There may be limitations in the City Charter, for instance, as to indebtedness limitations. Questions of this nature may be inquired into by the Commission as relevant to the practicability of the plan, but the Commission has no power to adjudicate them.

[3] Tacoma's suit was a special declaratory proceeding, provided by state law, to determine the validity of proposed bond issues by municipalities or other local authorities. Rev. Code Wash. (1951) 7.25.010–7.25.040. The statute requires that the suit be entitled as against the taxpayers of the city or area, and

The state Superior Court, Thurston County, sustained a demurrer to the complaint on the grounds that Tacoma, "a subordinate subdivision of the state", must derive its authority to build the dams from the state legislature and that the project was barred by the State's Columbia River Fish Sanctuary Act (Laws, 1949, Ch. 9) which prohibited dams above 25 feet in height upon the part of the Cowlitz involved (R. 57–59).

The Washington Supreme Court reversed in a 6–3 decision (R. 65–96). 43 Wn. 2d 468. It held that under *First Iowa Coop.* v. *Federal Power Commission,* 328 U. S. 152, a federally-licensed project could not be impeded by state restrictions or requirements as embodied in the Fish Sanctuary Act and other laws. Rejecting the contention that Tacoma "being a municipal corporation created by the state, may not defy the laws of its creator" (R. 89), the court pointed out that the city's long-standing power to engage in the electric power business had never been curtailed by the legislature (R. 89–90). Tacoma therefore qualified as a Federal Power Act licensee, the court noted (R. 91):

> The Federal Power Act defines the term municipal corporation and authorizes the power commission to issue a license to such an entity. Appellant has complied with the state law with respect to the right of a municipality to en-

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that the court name certain persons to represent all taxpayers for the purpose of testing the validity of the issue. Section 7.25.020. In the instant case, the state court appointed such representatives (R. 51–52) pursuant to the request in Tacoma's complaint (R. 4).

> ... the business of developing, transmitting and distributing power. Having been granted a license by the power commission, we hold that appellant is at the present time in the same position as any other licensee under the act. * * *

Accordingly, the dismissal of the complaint was reversed and the cause was remanded for further proceedings.

Present Proceedings. In the course of the complicated proceedings following the remand, the Directors of Fisheries and Game moved in the trial court on June 24, 1955, for a temporary restraining order and injunction *pendente lite* to enjoin Tacoma from continuing the development and construction of the project as it had undertaken to do (R. 123–24). Thereafter, the State of Washington, in its sovereign capacity, was added as a party defendant on the Directors' motion (R. 140, 143), and for the first time the defendants raised the issue of Tacoma's power, as a municipality of the State of Washington, to condemn the state-owned Mossyrock fish hatchery operated by the Game Department and located within the Mayfield reservoir site (R. 171, 173, 194, 196).[4] Tacoma's reply denied that it lacked the requisite

[4] The hatchery was included in the area required for the project set forth in Tacoma's municipal ordinance and the Federal Power Commission license (R. 8, 42, 153).

In its amended answer, the State of Washington also alleged that the project would take two other fish hatcheries, about 19 miles of primary state highways and other state-owned lands (R. 193–95). However, the subsequent stipulation established that these other hatcheries would not be affected (R. 229–30). Furthermore, state law provides a method for taking the high-

power to condemn those properties "under the laws of the United States and the State of Washington" (R. 205). It was stipulated that the Mayfield reservoir would flood 61.63 acres of the hatchery, including all its fishponds and buildings (R. 229); Tacoma asserted that the facilities could be relocated to assure continued full operation (R. 207).[5]

The Superior Court ruled that it lacked jurisdiction to pass on Tacoma's eminent domain authority since the lands to be condemned were in another county (R. 258). However, it held that Tacoma was acting illegally in constructing the project since it would interfere with public navigation contrary to state law (R. 258–59). Consequently, the court enjoined Tacoma from spending any more money on the project (260–62). Both sides appealed to the Supreme Court of Washington.

In another 6–3 decision, a new majority of the Washington Supreme Court denied Tacoma's power to condemn the fish hatchery, after ruling that the issue was properly before it (R. 279), and was not foreclosed by *res judicata* or the law of the case (R. 278–81). The court held that Tacoma did not have power to condemn land owned and used by the state for public purposes.

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ways which, aside from the Mossyrock hatchery, were the only other lands involved already dedicated to a public use. Rev. Code Wash. (1951) 90.28.010.

[5] Tacoma had repeatedly offered to buy the hatchery and relocate it with greatly improved facilities at a level above the reservoir, but the State, after finding administratively that the hatchery was "irreplaceable," had rejected the offers. See R. 175, 207, 292–93, 336–37.

In so holding, the Washington court reasoned as follows:—"A municipal corporation does not have an inherent power of eminent domain. It may exercise such power only when it is expressly authorized to do so by the *state legislature*" (italics in original; R. 282). Statutes making such a delegation to a municipality are to be strictly construed (R. 282–83). Several prior decisions under railroad condemnation statutes had held that authority to take lands granted to the state did not include state lands segregated from the public domain and appropriated to a public use (R. 283–84). Accordingly, in the court's view, the state statutes authorizing municipal corporations to operate public utilities and to condemn property in that connection do not authorize Tacoma to condemn state-owned property previously dedicated to a public use (R. 284). The court concluded that "the city of Tacoma has not been endowed with the statutory capacity to condemn such lands" (R. 284) and "*[i]ts inability so to act can be remedied only by state legislation that expands its capacity*" (italics in original; R. 285).

As to the effect to be given to the license issued by the Federal Power Commission, the court was of the view (R. 286):

> * * * the subject matter—the inherent inability of the city to condemn state lands dedicated to a public use—does not present a question of *state statutory prohibition*; it presents a question of *lack of state statutory power* in the city. It does not present a Federal question; it presents a question peculiarly within the jurisdiction of the state of Washington.

> The Federal government may not confer corporate capacity upon local units of government beyond the capacity given them by their creator, and the Federal power act, as we read it, does not purport to do so. [Italics in original.]

And since the question was not "of the right of the federal government to control all phases of activity on navigable streams, nor a question of its power, under the Federal Power Act, to delegate that right", but of the "capacity of a municipal corporation of this state" to act under the license (R. 285), the court regarded its ruling as not inconsistent with either the earlier Ninth Circuit decision (*supra*, pp. 5–6) or this Court's decision in *First Iowa Coop.* v. *Federal Power Commission*, 328 U. S. 152 (R. 285–86).

On those grounds, the court affirmed the injunction against Tacoma's construction of both dams. (R. 287, 371–73).*

SUMMARY OF ARGUMENT

The state court enjoined Tacoma from proceeding under a federal license for development of the resources of the Cowlitz River, on the ground that the city had no power to condemn a state-owned fish hatchery within the proposed reservoir area. While

* The state court stated that the lower court had erroneously relied upon the Washington laws with respect to public navigation; the federal program could not be impeded by such legislation, similar to the local statutes for protection of fish or requiring permits for diversion of water or building of dams (R. 370–71). However, Tacoma's lack of statutory capacity to condemn state lands dedicated to public use was an alternative, sufficient ground to block the development and to affirm the judgment below (R. 371).

this may be a correct view of Tacoma's power under state law, Tacoma's condemnation of the hatchery constitutes a lawful exercise of the federal power of eminent domain, delegated to Tacoma as a licensee under the Federal Power Act.

I

A. In Section 21 of the Federal Power Act, Congress explicitly authorized licensees to exercise the power of eminent domain in order to take lands for projects licensed by the Federal Power Commission. This is plainly a delegation of the federal power of eminent domain, long recognized as an attribute of the paramount federal sovereignty. That such federal power was intended to be conferred is borne out by the legislative history of the Federal Power Act; by previous cases sustaining condemnations under the Act and under the similar provisions of the Natural Gas Act; and by the scheme of the Power Act, which unqualifiedly asserts federal authority, including eminent domain, and specifically designates other areas left to state control.

B. There is no doubt that Tacoma qualified as a licensee under the Federal Power Act, since it is authorized by state law to engage in the electric utility business, and has done so since 1893, as the Washington Supreme Court recognized. Consequently, for purposes of its license, Tacoma falls within the terms of Section 21, delegating the federal power of eminent domain to licensees under the Power Act.

II

A. An essential element of the paramount federal power of eminent domain is that the United States may delegate it to agents of its own choosing and that no state may prescribe or restrict such delegation. Congress has, in the past, authorized the exercise of the federal condemnation power, and other franchises and powers, by municipalities and state corporations. In these cases, it was recognized that Congress may select state-created entities to carry out a federal program; and that, just as the states may not impede the United States itself, so they cannot interfere with the execution of federal powers by such delegates of the United States.

When a paramount federal power is thus delegated, it makes no difference that the state which created the municipality or corporation did not, or could not, grant it a similar power. Delegation of the federal power of eminent domain has enabled municipalities and state corporations to condemn land outside their state territories, a power which the creating state was constitutionally incapable of giving. Since the federal delegation is a complete, independent source of authority, it is immaterial whether the creating state approves the federal grant. Attempts by the state to oppose the delegation of federal power are ineffective, whether phrased in terms of capacity or otherwise.

This conclusion accords with the general doctrine of federal supremacy. Recognizing the propriety of using state-created entities as instrumentalities of the Federal Government, this Court has struck down

various state restrictions which would have impeded the delegated execution of federal programs.

B. These principles clearly apply, in the instant case, to the delegation of the federal power of eminent domain by Section 21 of the Federal Power Act, taken together with Tacoma's license. The Federal Power Commission issued its license to Tacoma in compliance with the mandate of Congress in the Federal Power Act, which includes a special preferential position for municipalities. The Washington court conceded that the state could not block the federal project by requiring compliance with conflicting state laws on water power and conservation. Similarly, we submit, Tacoma's exercise of the federal power of eminent domain in connection with the license cannot be barred by state law. The decision below would improperly frustrate the Cowlitz project and the Federal Power Commission's choice of licensee.

III

Since Tacoma has validly been delegated the federal power of eminent domain, it may condemn a state-owned fish hatchery in order to execute the development licensed by the Federal Power Commission.

A. It is well settled that the federal condemnation power may be exercised to take, for federal purposes, state-owned property held for a prior public use. This is required by the doctrine of federal supremacy, which is equally effective whether the power is exercised directly by the United States or by a delegate, such as a licensee under the Federal Power Act.

In the instant case, Tacoma's intended federal public use is established by the paramount authority of Congress over commerce and navigable waters, and by Tacoma's federal license, which specifies the hatchery among the "lands constituting the project area" and required for the licensed project. Even if the comparative importance of the old and new public uses were significant, there is no doubt that the Cowlitz power development outweighs by far the state hatchery; it appears, in fact, that the hatchery can be relocated without much difficulty.

B. The decision below is not supported by the alleged rule of Washington law that the condemnation power of municipalities does not extend to state property held for public use. In the first place, this is only a rule of construction of the state grant of eminent domain power; it has no relevance to the federal power exercised by Tacoma as a licensee under the Federal Power Act.

Furthermore, the prior Washington authorities do not suggest that Tacoma lacks capacity to act under a delegation of federal power. Tacoma has a general condemnation power as a municipality under state law and, in construing it, the Washington court has always assumed capacity whenever the grant of power is shown. That licensees under the Federal Power Act receive federal authority has also been recognized. A restrictive view of the state grant of condemnation power to delegates—excluding state lands already being used for public purposes—operates only to permit the state legislature to decide between competing uses both of which are authorized

by it. Such a rule does not operate against the state itself and, similarly, it does not bar the overriding condemnation power of the Federal Government.

ARGUMENT

In the decision under review, the Washington Supreme Court holds that the City of Tacoma, although acting under a valid federal license pursuant to the Federal Power Act, cannot condemn state lands previously dedicated to a public use. The state court recognizes that this ruling operates to prevent the construction of the federally-licensed project (R. 371). If the decision below stands, the anticipated flooding of 61.63 acres of a state fish hatchery, which could probably be adequately relocated (R. 229, 207, 336–37), will block a project costing $146,000,000 which was found by the Federal Power Commission to promise an exceptionally valuable addition to the Northwest Region power supply, and the cheapest, most efficient, and best adapted plan for development of the Cowlitz River (R. 9, 33, 34, 39–40).

The state court reached this result because it believed that only state law could authorize Tacoma to condemn the hatchery, and reviewing the Washington authorities, the court concluded that the power of eminent domain available to Tacoma under state law did not extend to the state hatchery. The federal power of eminent domain was dismissed with these words (R. 286):

> The Federal government may not confer corporate capacity upon local units of government beyond the capacity given them by their creator,

and the Federal power act, as we read it, does not purport to do so.

However, we shall show that Section 21 of the Federal Power Act does indeed purport, and was plainly intended by Congress, to delegate the federal eminent domain power to licensees like Tacoma, regardless of state law or state restrictions; and that this federal power may constitutionally be delegated to municipal corporations or other state-created entities, regardless of the power and capacity given them under state law. Furthermore, the federal condemnation power thus delegated is effective to take state lands previously held for public use.

I

BY SECTION 21 OF THE FEDERAL POWER ACT, CONGRESS DELEGATED THE FEDERAL POWER OF EMINENT DOMAIN TO LICENSEES UNDER THE ACT

A. In the Federal Power Act, Congress has explicitly authorized licensees to exercise the power of eminent domain for the construction and operation of the project for which a license has been granted. Section 21 of the Act, *infra*, p. 53, provides:

> That when *any licensee* can not acquire by contract or pledges an unimproved dam site or the right to use or damage *the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto*, in conjunction with an improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or

> developing a waterway or waterways for the use or benefit of interstate or foreign commerce, *it may acquire the same by the exercise of the right of eminent domain* in the district court of the United States for the district in which such land or other property may be located, or in the State courts. * * * [Emphasis added.]

It can scarcely be doubted that the terms of this portion of Section 21 broadly delegate the federal power of eminent domain to federal licensees, to be exercised independently of state law. The provision is patently a direct authorization, without reference to state law; the sole condition upon the exercise of eminent domain is that the land or site must be "necessary" for the federally-licensed project. And the power thus delegated is necessarily the federal power of eminent domain. This is the only authority which Congress has at its disposal, as an attribute of the federal sovereignty. *Kohl* v. *United States,* 91 U. S. 367, 371–75; *Latinette* v. *City of St. Louis,* 201 Fed. 676, 678 (C. A. 7).

Ever since *Kohl* v. *United States,* 91 U. S. 367, there has been no doubt that the United States has an independent power of eminent domain as an attribute of its sovereignty and that this paramount federal power (91 U. S. at 374):

> * * * must be complete in itself. It can neither be enlarged nor diminished by a State. Nor can any State prescribe the manner in which it must be exercised. The consent of a State can never be a condition precedent to its enjoyment.

United States v. *Carmack*, 329 U. S. 230, 236–42; *Cherokee Nation* v. *Kansas Railway Co.*, 135 U. S. 641, 656.[7]

The congressional intent to exercise the federal eminent domain power in Section 21 and to provide a comprehensive basis for condemnation by licensees is underlined by the scheme of the Power Act, as analyzed in *First Iowa Coop.* v. *Federal Power Commission*, 328 U. S. 152. Holding that state permission to divert water and build a dam could not be a prerequisite for a federal license, this Court pointed out that the Act represented a major undertaking of the federal government in the development of our water resources (see also *United States* v. *Appalachian Power Co.*, 311 U. S. 377). While certain subjects were left to state control, these were carefully kept separate from areas covered by assertions of federal authority. The

[7] There is, in fact, authority for the proposition that, when solely national purposes are intended, the Constitution permits reliance only upon the federal eminent domain power. See *Kohl* v. *United States*, 91 U. S. at 373–74, citing with approval *Trombley* v. *Humphrey*, 23 Mich. 471, which denied state power to condemn land for a federal lighthouse; see also *Latinette* v. *City of St. Louis*, 201 Fed. at 678.

On the other hand, some courts have said that a federal licensee under the Power Act has the choice of taking land under Section 21 or utilizing a general power of eminent domain which the state had given it. See *Burnett* v. *Central Nebraska Public Power and Irrigation District*, 147 Neb. 458, 470; *Oakland Club* v. *South Carolina Public Service Authority*, 110 F. 2d 84, 86 (C. A. 4). These decisions do not, however, suggest that the state grant could restrict Section 21. They recognize that Section 21 embodies the federal eminent domain power and provides an independent source of authority. Similarly, see *Grand River Dam* v. *Grand Hydro.*, 335 U. S. 359, 373.

plenary nature of such federal powers was described as follows (328 U. S. at 168, 176, 181):

> * * * Where the Federal Government supersedes the state government there is no suggestion that the two agencies both shall have final authority. * * *
>
> * * * [W]here rights are not thus "saved" to the States, Congress is willing to let the supersedure of the state laws by federal legislation take its natural course. * * *
>
> The detailed provisions of the Act providing for the federal plan of regulation leave no room or need for conflicting state controls. * * *[*]

The Court then listed elements of this "federal plan of regulation", including (328 U. S. at 181, n. 25):

> * * * § 21, federal powers of condemnation vested in licensee; * * *

That a delegation of an independent federal power was being made in Section 21 was clearly understood by Congress. For that very reason, the provision aroused opposition. When Section 21 was being discussed on the floor of the House, Congressman Eugene Black of Texas interjected (58 Cong. Rec. 1932):

> * * * and the thought occurs to me that unless the State itself will confer on the municipality or subdivision of a State the right of eminent domain it is very doubtful as to whether the Federal Government ought to come in and do it.

Congress overrode such objections when it enacted Section 21. In fact, the provision was broadened to

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[*] See also *Federal Power Commission* v. *Oregon*, 349 U. S. 435, 445-46.

confer the condemnation power generally upon "any licensee" instead of specifying municipalities, political subdivisions of a state, and public utility or service corporations, the form in which it stood when Representative Black took exception (58 Cong. Rec. 2240).

A number of reported cases reflect the utilization of Section 21 by federal power licensees. In all these decisions the courts plainly recognized that it was the delegated condemnation power of the Federal Government which was being exercised. See *Central Nebraska Public Power & Irrigation District* v. *Harrison*, 127 F. 2d 588, 589 (C. A. 8); *Feltz* v. *Central Nebraska Public Power & Irrigation Dist.*, 124 F. 2d 578, 581, 582 (C. A. 8); *Grand River Dam Authority* v. *Thompson*, 118 F. 2d 242, 243 (C. A. 10); *Union Electric Light & Power Co.* v. *Snyder Estate Co.*, 65 F. 2d 297, 300 (C. A. 8); *Wilson* v. *Union Electric Light & Power Co.*, 59 F. 2d 580, 581 (C. A. 8); *State of Missouri* v. *Union Electric Light & Power Co.*, 42 F. 2d 692, 697–98 (W. D. Mo.); *Alabama Power Co.* v. *Gulf Power Co.*, 283 Fed. 606, 610–11, 616–17 (M. D. Ala.). The similar eminent domain provision of the Natural Gas Act, Section 7 (h), 15 U. S. C. 717f (h), has also been applied as a federal authority by natural gas companies. *Thatcher* v. *Tennessee Gas Transmission Co.*, 180 F. 2d 644, 647 (C. A. 5), certiorari denied, 340 U. S. 829; *Williams* v. *Transcontinental Gas Pipe Line Corp.*, 89 F. Supp. 485 (W. D. S. C.).* As we shall show, *infra*, pp. 25, 34, n. 15, these cases

*Section 7 (h) of the Natural Gas Act was adapted from the Power Act's Section 21. H. Rept. No. 695, 80th Cong., 1st Sess., p. 2, 1947 U. S. Code Cong. Serv., p. 1477.

also demonstrate that the federal power can be given to state-created entities. And a situation similar to the instant case was presented in *State of Missouri* v. *Union Electric Light & Power Co., supra,* in which the court held that a licensee under Section 21 could condemn state lands previously dedicated to a public use. See *infra,* pp. 40–41.

B. It should be noted, by way of contrast, that the Power Act does require reference to state law for one pertinent factor—to establish a municipality's basic authority to engage in the utility business. Section 3 (5) of the Act, *infra,* p. 51, defines "licensee" as meaning "any person, State, or municipality licensed under the provisions of section 4 of this Act," and Section 3 (7), *infra,* p. 51, defines "municipality" as "a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power."

There is no doubt that Tacoma fully satisfies this requirement. The Washington Supreme Court, in its earlier opinion (*supra,* pp. 6–8), recognized that Tacoma has lawfully operated electric power facilities since 1893 (R. 89–90) and that it "has complied with the state law with respect to the right of a municipality to engage in the business of developing, transmitting and distributing power. * * *" (R. 91.)[10] The state court thus used the precise terms of Section 3 (7)

[10] In Washington, all classes of municipal corporations have been authorized for at least forty years to operate electric utility systems, including hydroelectric projects (R. 89) ; *Hutton*

of the Federal Power Act, demonstrating that Tacoma had fully qualified to become a federal licensee; the court then stated (R. 91):

> * * * Having been granted a license by the power commission, we hold that appellant [Tacoma] is at the present time in the same position as any other licensee under the act. * * *

See also the decision of the Ninth Circuit in *State of Washington Dept. of Game* v. *Federal Power Commission*, 207 F. 2d 391, certiorari denied, 347 U. S. 936, *supra*, pp. 5–6.

There is, accordingly, no doubt both that the federal eminent domain power has been delegated to "any licensee" under the Federal Power Act and also that Tacoma is such a "licensee." The question then is whether this general delegation of federal power is subject to special restrictions in the case of municipalities or other state-created public entities (discussed in Point II, *infra*, pp. 24–38), and, further, whether this federal power extends to state lands previously held for public use (discussed in Point III, *infra*, pp. 38–50).

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v. *Martin*, 41 Wn. 2d 780, 783; *Tacoma* v. *Nisqually Power Co.*, 57 Wash. 420.

The current statute, Rev. Code Wash. (1951), 80.40.050, *infra*, pp. 57–58, broadly authorizes cities to:

> * * * construct, condemn and purchase, purchase, acquire, add to, maintain, and operate works, plants, and facilities for the purpose of furnishing the city or town and its inhabitants, and any other persons, with gas, electricity, and other means of power and facilities for lighting, heating, fuel, and power purposes, public and private. * * *

See also Rev. Code Wash. (1951), 35.22.280 (15), 35.84.010–35.84.030, 80.40.010, *infra*, p. 53 *ff*.

II

THE FEDERAL EMINENT-DOMAIN POWER UNDER SECTION 21 OF THE FEDERAL POWER ACT MAY BE DELEGATED TO A MUNICIPAL CORPORATION LIKE TACOMA AND TO OTHER STATE-CREATED ENTITIES, REGARDLESS OF ALLEGED LIMITATIONS UPON THEIR POWER AND CAPACITY UNDER STATE LAW

A. When the Washington court stated that "the Federal government may not confer corporate capacity [for eminent domain] upon local units of government beyond the capacity given them by their creator" (R. 286), it held in substance that the exercise of the overriding federal power of eminent domain could be effectively blocked by a state. As we have already noted, *supra*, p. 18, "the manner in which [the federal power] must be exercised" cannot be prescribed by a state (*Kohl* v. *United States*, 91 U. S. 367, 374). We submit that an essential aspect of this power is that the United States may delegate it to agents of its own choosing, including state-created entities."

1. Accordingly, Congress has, upon occasion, chosen to authorize the exercise of the federal eminent domain power by corporations created under federal law (*e. g., Luxton* v. *North River Bridge Co.*, 153 U. S. 525; *Berman* v. *Parker*, 348 U. S. 26); by private corporations created under state law (*e. g., Cherokee Nation* v. *Kansas Railway Co.*, 135 U. S. 641; *Stockton*

" Lands may be condemned for federal purposes either "directly by the sovereign or through an agency appointed by the sovereign." *Lafayette* v. *City of St. Louis*, 201 Fed. 676, 678 (C. A. 7). See Nichols on *Eminent Domain*, Secs. 1.24, 2.13, 2.15; Lewis, *Eminent Domain*, Secs. 367, 374.

v. *Baltimore & N. Y. R. Co.*, 32 Fed. 9 (D. N. J.), appeal dismissed, 140 U. S. 699; cf. *St. Louis* v. *Western Union Telegraph Co.*, 148 U. S. 92, 100–01); by a state or state bodies (*e. g., City of Davenport* v. *Three-Fifths of an Acre of Land*, 147 F. Supp. 794 (S. D. Ill.); *County Court of Wayne County* v. *Louisa & Fort Gay Bridge Co.*, 46 F. Supp. 1, 3 (S. D. W. Va.)); and by municipalities (*e. g., Latinette* v. *City of St. Louis*, 201 Fed. 676 (C. A. 7); *City of Davenport* v. *Three-Fifths of an Acre of Land, supra; Klein* v. *City of Louisville*, 224 Ky. 624). The reported cases under Section 21 of the Power Act show that the federal power there embodied has been exercised by corporations (*State of Missouri* v. *Union Electric Light & Power Co.*, 42 F. 2d 692 (W. D. Mo.); *Alabama Power Co.* v. *Gulf Power Co.*, 283 Fed. 606 (M. D. Ala.)); by a state authority (*Grand River Dam Authority* v. *Thompson*, 118 F. 2d 242 (C. A. 10)); and by a state power district (*Central Nebraska Public Power & Irrigation District* v. *Harrison*, 127 F. 2d 588 (C. A. 8)). See p. 21, *supra*.

In the same way, the United States has granted to state companies franchises or powers other than eminent domain, and such grants have been sustained. *Seaboard Air Line Railroad Co.* v. *Daniel*, 333 U. S. 118; *Texas* v. *United States*, 292 U. S. 522; *California* v. *Pacific R. Co.*, 127 U. S. 1, 38, 40–45; *People* v. *Hudson River Connecting Railroad Corp.*, 186 App. Div. 602 (3rd Dept.), affirmed, 228 N. Y. 203, certiorari denied, 254 U. S. 631. In *Seaboard Air Line Railroad*, the Court sustained an Interstate Commerce Commission order which empowered a Virginia cor-

poration to operate in South Carolina, despite a contrary South Carolina law, and stated (333 U. S. at 126–127):

> * * * Although [the last sentence of Section 5 (11) of the Commerce Act [12]] bars creation of a federal corporation, it clearly authorizes a railroad corporation to exercise the powers therein granted over and above those bestowed upon it by the state of its creation. These federally conferred powers can be exercised in the same manner as though they had been granted to a federally created corporation. See *California* v. *Central Pacific R. Co.*, 127 U. S. 1, 38, 40–5. Here, just as a federally created railroad corporation could for federal purposes operate in South Carolina, so can this Virginia corporation exercise its federally granted power to operate in that State.

In the eminent domain field, the propriety of the grant of federal power to state-created entities was first definitively stated by Justice Bradley while on circuit, *Stockton* v. *Baltimore & N. Y. R. Co.*, 32 Fed. 9 (D. N. J.), appeal dismissed, 140 U. S. 699, a classic opinion repeatedly approved by this Court.[13] There,

[12] The last sentence in Section 5 (11) of the Interstate Commerce Act, 49 U. S. C. 5 (11), provides: "Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State."

[13] See *United States* v. *Carmack*, 329 U. S. 230, 240; *United States* v. *Wayne County, Kentucky*, 252 U. S. 574; affirming 53 Ct. Cls. 417; *Pullman Co.* v. *Kansas*, 216 U. S. 56, 68 (White, J., concurring); *Luxton* v. *North River Bridge Co.*, 153 U. S. 525, 532; *Cherokee Nation* v. *Kansas Railway Co.*, 135 U. S. 641.

the Attorney General of New Jersey sought to enjoin the construction by the railway, a New York corporation, of a railway bridge authorized by a federal statute from New Jersey to Staten Island, New York. Justice Bradley affirmed "the capacity and right" of the railway to construct the bridge in New Jersey, ruling (32 Fed. at 14–15):

> At all events, if congress, in the execution of its powers, chooses to employ the intervention of a proper corporation, whether of the state, or out of the state, we see no reason why it should not do so. There is nothing in the constitution to prevent it from making contracts with or conferring powers upon, state corporations, for carrying out its own legitimate purposes. What right of the state would be invaded? The corporation thus employed, or empowered, in executing the will of congress, could do nothing which the state could rightfully oppose or object to. It may be added that no state corporation more suitable than the defendant could be empowered to build the bridge in question in this case, since one-half of the bridge is in the state of New York, and the railroad of the defendant is to connect with it on the New York side.[14]

[14] Justice Bradley continued (*id.* at 15):

> In our judgment, if congress itself has the power to construct a bridge across a navigable stream for the furtherance of commerce among the states, it may authorize the same to be done by agents, whether individuals, or a corporation created by itself, or a state corporation already existing and concerned in the enterprise. The objection that congress cannot confer powers on a state corporation is untenable. It has used their agency for carrying on its

While, in *Stockton,* federal power was delegated to a state-chartered private corporation, the principle is equally applicable when the delegation is a municipal corporation created by state law. Thus, in *Latinette* v. *City of St. Louis,* 201 Fed. 676 (C. A. 7), the question related to the power of the City of St. Louis, a Missouri municipal corporation, to condemn land in Illinois for the purpose of building a bridge across the Mississippi River pursuant to a federal statute. Rejecting the argument that the City could not condemn Illinois property because Illinois had not given it the requisite power, the Seventh Circuit pointed out that the construction of the bridge and its necessary approaches were matters of national concern, and ruled (201 Fed. at 678–679):

> own purposes from an early period. It adopted as post-roads the turnpikes belonging to the various turnpike corporations of the country, as far back as such corporations were known, and subjected them to burdens, and accorded to them privileges, arising out of that relation. It continued the same system with regard to canals and railroads when these modes of transportation came into existence. Nearly half a century ago, it constituted every railroad built, or to be built, in the United States, a post-road. This, of course, involved duties, and conferred privileges and powers, not contained in their original charter. In 1866, congress authorized every steam-railroad company in the United States to carry passengers and goods on their way from one state to another, and to receive compensation therefor, and to connect with roads of other states, so as to form continuous lines for the transportation of the same to the place of destination. The powers thus conferred were independent of the powers conferred by the charter of any railroad company. Surely these acts of congress cannot be condemned as unconstitutional exertions of power.

> * * * that the nation had the right itself to build and maintain the bridge and approaches, and, for the purpose of acquiring land for the approaches, to exercise the power of eminent domain either directly or through a corporation created by it for that end, without the consent or over the objection of the state—are propositions too well settled to warrant elaboration or debate. * * * Contention is therefore narrowed to this: That Congress could not constitutionally select appellee as the agency through which a national power should be exercised. Nothing in the Constitution forbids the selection of a state corporation as a national agent. *In reason the material thing is the principal's authority, not the parentage or birthplace of the agent.* * * * [Emphasis added.]

Similarly, the courts have upheld the taking by Louisville, Kentucky, and Davenport, Iowa, of lands in neighboring states for use in interstate bridges, under federal grants of authority. *Klein* v. *City of Louisville*, 224 Ky. 624; *City of Davenport* v. *Three-Fifths of an Acre of Land*, 147 F. Supp. 794 (S. D. Ill.).

2. It has made no difference that the state which created the corporation or municipality did not, or could not, grant it the power which it exercises under its federal authority. Thus, in nearly all the condemnation cases cited, *supra*, pp. 24–29, the federal grant extended the power of the state entities beyond the constitutional capacity of the creating states. "The powers thus conferred were independent of the powers conferred by the charter" received from the creating

states (*Stockton* v. *Baltimore & N. Y. R. Co., supra,* 32 Fed. at 15). The states themselves could not constitutionally have taken property in another state (*County Court of Wayne County* v. *Louisa & Fort Gay Bridge Co., supra*), nor have authorized a private corporation created by them (*Stockton & Baltimore* v. *N. Y. R. Co., supra*) or their municipal corporations (*Latinette* v. *City of St. Louis, supra; City of Davenport* v. *Three-Fifths of an Acre of Land, supra; Klein* v. *City of Louisville, supra*) to condemn property in another state. Furthermore, no state could empower its corporation to exercise eminent domain in Indian territory (*Cherokee Nation* v. *Kansas Railway Co., supra*). Nevertheless, in each of these situations, the grant of federal authority to a state-created instrumentality, for the purpose of enabling it to carry out federally-authorized functions, was effective to bestow the requisite power.

Consequently, since the federal delegation provides a complete independent source of condemnation power for municipalities or corporations, it is immaterial to consider the views or the law of the state which created them. In *Klein* v. *City of Louisville, supra,* the Kentucky court pointed out the immateriality of a state law which purported to authorize Louisville "to exercise in any adjoining state such powers of eminent domain as may be conferred * * * by * * * Congress." 224 Ky. at 627. The court noted that, under state law, these would be invalid "extraterritorial powers," *id.* at 633. Nevertheless, the federal powers could be exercised by the city as a federal agent (*id.* at 633–35), and, in that event, "it is not essential for the state

Legislature to authorize its officers to so act" (*id.* at 635). Similarly, in *California* v. *Pacific R. Co.*, 127 U. S. 1, Congress empowered the Southern Pacific Railroad to extend its line to the Colorado river, not covered by its original California charter. Thereafter, the state legislature also authorized this extension. This Court noted that the "duplication" of the federal grant "was probably procured to remove all doubts with regard to the company's power to construct such roads. It is apparent, however, that the franchise to do so was fully conferred by Congress * * *." 127 U. S. at 44–45.

If it is an act of supererogation for a state to approve the federal grant of eminent domain to a state-created entity, it follows that the state's objections, whether phrased in terms of capacity or otherwise, cannot impede the exercise of the federal power. Thus, in upholding the freedom from state control of railroads under orders of the Interstate Commerce Commission, this Court has not suggested any difference between exemptions granted from the laws of another state (e. g., *Seaboard Air Line Railroad Co.* v. *Daniel*, 333 U. S. 118, *supra*, pp. 25–26), or from the laws of the state which chartered the railroad (*Texas* v. *United States*, 292 U. S. 522).

A striking illustration is provided by *People* v. *Hudson River Connecting Railroad Corp.*, 186 App. Div. 602 (3rd Dept.), affirmed, 228 N. Y. 203, certiorari denied, 254 U. S. 631 (*supra*, p. 25). The corporation was created under the terms of the New York Railroad Law for the purpose of building a railroad, including a bridge across the Hudson. Construction

of the bridge was authorized by a special state statute, which placed certain restrictions upon its size, clearance, and other factors. Congress then authorized construction of the same bridge without these restrictions. Thereupon, the New York legislature amended the section of the state's Railroad Law which set forth the powers of corporations created under it, and inserted conditions upon the charter powers which would have prevented the execution of the federal authorization. 186 App. Div. at 605, 612. Laws 1918, c. 166, amending New York Railroad Law (McKinney's Consol. Laws, Title 48) Section 8 (3). The railroad was thus faced with an express limitation in its statutory powers clause, not merely, as here, a questionable judicial construction of prior precedents. See pp. 44–50, *infra*. Nevertheless, the New York court upheld the railroad's federal franchise, and flatly rejected the state's attempt to limit the railroad's "capacity" to act under it, in these cogent words (186 App. Div. 611–12):

> It is suggested that the State having created the defendant may limit its operation in respect to the bridge in question; that the creator may control its creature. * * * Ordinarily it may be true that the Legislature may within proper limits control a corporation created by itself. But the question here is whether it can do so when the sole effect of the attempted control is to thwart the will of Congress in respect to a matter exclusively within its jurisdiction. The State cannot prevent the construction of this bridge. Can it, therefore, hinder, impede and embarrass its construction

> by arbitrarily or capriciously declaring it unlawful for its corporation to engage in such construction? It seems to me the only logical answer is in the negative. * * *

In short, regardless of the mechanism devised, a state cannot obstruct the lawful delegation of the federal power of eminent domain to a state-created entity. For, as stated in *Latinette* v. *City of St. Louis*, *supra*, 201 Fed. at 679, "In reason the material thing is the principal's authority [*i. e.*, the federal government], not the parentage or birthplace of the agent."

3. This conclusion follows from, and accords with, the general doctrine of federal supremacy. When municipalities and state corporations act as valid instrumentalities of the Federal Government, federal supremacy precludes state attempts to interfere with the authorized projects or to circumscribe the execution of delegated federal powers. From the earliest days, state-created entities have been utilized as instrumentalities of the Federal Government. See footnote 14, *supra*, p. 27. Both this Term and last Term, the Court reaffirmed this practice when it struck down an attempt by a state to impose its normal licensing requirements upon a contractor chosen by the United States (*Leslie Miller, Inc.* v. *United States*, 352 U. S. 187), or its normal rate procedures upon a carrier utilized by the United States (*Public Utilities Commission* v. *United States*, No. 23, October Term 1957, decided March 3, 1958). The Court pointed out that federal procurement statutes and regulations committed certain decisions to federal officials, *e. g.*, in *Leslie Miller, Inc.*, selection of "the lowest responsible

bidder". Such determination by federal officials could not be subjected to the "virtual power of review" of a state body. 352 U. S. at 189–90. See also, *e. g., Johnson* v. *Maryland,* 254 U. S. 51, 56–57; *Cities Service Gas Co.* v. *State Corporation Commission of Kansas,* 355 U. S. 391.

B. There is every reason to apply these settled principles to Section 21 of the Federal Power Act, and its broad grant of eminent domain power to "any licensee" under the Act.[15] Congress has given a mandate to the Federal Power Commission which should not be countermanded by state legislatures, state executives, or state courts. In the instant case, the decision of the court below reviewed and—as a practical matter—upset the selection of a federal licensee made in compliance with an explicit direction of Congress. Under Section 7 (a) of the Power Act, 16 U. S. C. 800 (a), *infra,* pp. 51–52, the Commission must compare alternative plans according to how they are "adapted to conserve and utilize in the public interest the water resources of the region." Furthermore, the Commission is specifically directed in Section 7 (a) to give preference to states and municipalities over other applicants when their plans equally meet the statutory criterion.

[15] Until the decision below, condemnations under Section 21 have been enforced without mention of state law or of the licensee's capacity under it (*supra,* pp. 21, 25). The courts have apparently assumed, to quote the District Court in Missouri, that "it cannot be questioned but that the Congress had the power to confer the right of eminent domain upon" the licensees. *State of Missouri* v. *Union Electric Light & Power Co.,* 42 F. 2d at 698.

Following this mandate, the Commission found that Tacoma's project on the Cowlitz could be constructed more quickly and economically than any alternative (R. 34) and that it (R. 39–40)—

> * * * is best adapted to a comprehensive plan for improving or developing the waterway involved for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the conservation and preservation of fish and wildlife resources, and for other beneficial public uses including recreational purposes.

See pp. 4–5, *supra*. The Commission's adherence to the statutory preference for public bodies is demonstrated by the fact that of the 245 major projects licensed up to June 1957, with aggregate ultimate generating capacity of 23,161,136 horsepower, municipalities and state bodies have been licensed for 43, to produce 7,530,000 horsepower.[16]

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[16] Federal Power Commission, Thirty-Seventh Annual Report, Fiscal Year ended June 30, 1957, pp. 56, 91–96. With respect to completed projects under Power Act licenses at June 1957, municipalities and state bodies were operating 32 projects with a capacity of about two million horsepower out of a total installed capacity under license of 11,259,799 horsepower.

The preferential position of States and municipalities was extensively discussed before passage of the Power Act. *E. g.*, 56 Cong. Rec. 9113, 9313–16, 9804; 58 Cong. Rec. 2037–40; 59 Cong., Rec. 1172–73. It is also reflected in the Act's exemption of states and municipalities from annual license charges insofar as they utilize power for public purposes or sell to the public without profit, Section 10 (e), 16 U. S. C. 803 (e), *infra*, p. 52, and in their more recent exemption from recapture by the United States and from certain bookkeeping requirements (67 Stat. 587, 16 U. S. C. (1952 ed., Supp. IV) 828–828c). Similarly, municipalities are among those preferred

Nevertheless, the Washington court frustrated the choice of Tacoma as a federal licensee, by ruling that the city could only condemn property by virtue of authority from the state legislature. While conceding that the Washington legislature cannot prohibit the federal project or demand compliance with state requirements for permits, technical supervision or conservation, the state court asserts that a different problem is presented by Tacoma's "lack of state statutory power" to condemn the fish hatchery (R. 286).[17]

But the point is, as we have stressed, that the delegation of federal eminent domain power is an act of

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in sales of power by the Tennessee Valley Authority, the Bonneville Project and the Fort Peck Project. Sec. 10 of Tennessee Valley Authority Act, 48 Stat. 64, 16 U. S. C. 831i; Secs. 3, 4 of Bonneville Act, 50 Stat. 733, 16 U. S. C. 832b, 832c; Secs. 3, 4 of Fort Peck Act, 52 Stat. 405, 16 U. S. C. 833b, 833c.

[17] The state court employed a distinction between Tacoma's "lack of power" to condemn, which allegedly bars the federal project, and the other state "prohibitions", which would be ineffective to do so, in order to avoid the impact of *First Iowa Coop. v. Federal Power Commission*, 328 U. S. 152, *State of Washington Dept. of Game v. Federal Power Commission*, 207 F. 2d 391, certiorari denied, 347 U. S. 936 and its own previous opinion, 43 Wn. 2d 468 (R. 65–92). See pp. 9–11, *supra*.

However, there is nothing in Washington law to support the theory that a unique capacity is required for the eminent domain power, as compared with, *e. g.*, the power to build power plants. See pp. 45–49, *infra*. Furthermore, the Washington court and the Ninth Circuit, when dealing with such powers other than eminent domain, both held that Tacoma could "defy the laws of its creator" and ignore restrictions of state law (R. 89–91; 207 F. 2d at 396), even though at least one of the state laws, the Fish Sanctuary Act, was apparently passed for the express purpose of blocking the Cowlitz project (R. 95). And as the Ninth Circuit pointed out, the petitioner in *First Iowa Coop.* was a cooperative organized in Iowa which also did not have to comply with the laws of the state which

an independent and superior sovereign, and is an essential part of the federal license to build the dams. Just as Washington may not assert a "veto power over the federal project", because of Congress' plenary authority to regulate commerce (*First Iowa Coop.* v. *Federal Power Commission*, 328 U. S. at 164; *supra*, pp. 19–20), so it may not challenge Tacoma's exercise of the federal power of eminent domain. Section 21's express delegation "leave[s] no room or need for conflicting state controls"; state law limitations upon Tacoma are superseded as a matter of "natural course". See *First Iowa Coop.* v. *Federal Power Commission*, 328 U. S. at 181, 176.[28] If the decision below stands, an easy avenue will be open for any state to "veto" the Commission's grant of a license to a municipality, despite the preferential treatment which Section 7 (a) of the Power Act commands (*supra*, p. 34). And the Federal Power Com-

created it (207 F. 2d at 396). See 328 U. S. at 156. See pp. 5–6, *supra*.

It should be noted that the decision below would lead to the anomalous result that Washington could prevent Tacoma from executing the Cowlitz development, and might possibly apply the same bar of lack of power to a private Washington corporation, but it could not "prohibit" a municipality or company of another state from carrying out the same project.

[28] On the other hand, neither the Power Act nor the license purport to deal with Tacoma's abilities or techniques in financing the project. Hence, its authority under state law may be consulted, as the Ninth Circuit stated (207 F. 2d at 396):

> * * * However, we do not touch the question as to the legal capacity of the City of Tacoma to initiate and act under the license once it is granted. There may be limitations in the City Charter, for instance, as to indebtedness limitations. * * *

mission, confronted with the potential inability of municipal corporations otherwise authorized under state law to proceed under a federal license, might have little choice but to grant the license to private power companies which presumably would not be subject to the special rule espoused below for municipalities.

III

THE STATE-OWNED MOSSYROCK FISH HATCHERY MAY BE TAKEN BY TACOMA, AS LICENSEE UNDER THE FEDERAL POWER ACT, IN THE EXERCISE OF ITS FEDERAL POWER OF EMINENT DOMAIN

We have shown that the Federal Government may validly vest power in a state-created entity—beyond that given it by the state—in order to enable it to carry out federally-authorized functions (*supra*, pp. 17–22, 24 *ff*) and that Tacoma as a licensee has been fully given the federal condemnation power by Section 21 of the Power Act (*supra*, pp. 22–23, 34–38). It is also clear that Tacoma may, in order to build and maintain the Mossyrock and Mayfield dams, condemn the 61.63 acres of the state-owned fish hatchery.

A. THE FEDERAL CONDEMNATION POWER DELEGATED TO TACOMA EXTENDS TO STATE LANDS HELD FOR A PRIOR PUBLIC USE

1. It is now settled that the federal power of eminent domain may be exercised to take state-owned property held for a prior public use. *United States* v. *Carmack*, 329 U. S. 230; *Oklahoma* v. *Guy F. Atkinson Co.*, 313 U. S. 508; *Wayne County, Kentucky* v. *United States*, 53 Ct. Cls. 417, affirmed, 252 U. S. 574. Cf. *United States* v. *Gettysburg Electric Ry. Co.*, 160

U. S. 668; *St. Louis* v. *Western Union Telegraph Co.*, 148 U. S. 92, 100-01; *Kohl* v. *United States*, 91 U. S. 367, 371; 12 Op. A. G. 173, 175. A wide variety of such state property has been thus condemned when required in execution of a federal program.[19]

The Court restated the supremacy of this federal power in *United States* v. *Carmack*, *supra*, where the federal government condemned, for a post office and customs house, state property including a county court house, city hall and public park (329 U. S. at 236, 239, 240):

> The power of eminent domain is essential to a sovereign government. If the United States has determined its need for certain land for a

[19] *Oklahoma* v. *Guy F. Atkinson*, *supra* (state schools, highways, rights-of-way, bridges, prison farm); *Wayne County, Kentucky* v. *United States*, *supra* (state highway); *United States* v. *Montana*, 134 F. 2d 194 (C. A. 9), certiorari denied, 319 U. S. 732 (school lands); *Minnesota* v. *United States*, 125 F. 2d 636 (C. A. 8), affirming, 27 F. Supp. 167 (D. Minn.) (public hunting and game refuge); *United States* v. *Wheeler Township*, 66 F. 2d 977 (C. A. 8) (highways); *United States* v. *Latham Bixby Co.*, 55 F. 2d 317 (S. D. Cal.), affirmed *sub nom. C. M. Patten & Co.* v. *United States*, 61 F. 2d 970 (C. A. 9), vacated as moot, 289 U. S. 705 (public park); *City of Davenport* v. *Three-Fifths of an Acre of Land*, 147 F. Supp. 794 (S. D. Ill.); *United States* v. *.8677 Acre of Land*, 42 F. Supp. 91 (E. D. S. C.) (street and highway); *United States* v. *273.98 Acres of Land*, 41 F. Supp. 683 (W. D. Wash.) (school lands); *United States* v. *72 Acres of Land*, 37 F. Supp. 297 (N. D. Cal.), affirmed, 124 F. 2d 959 (C. A. 9) (waterfront); *United States* v. *Certain Parcels of Land*, 30 F. Supp. 372 (D. Md.) (public square, park); *United States* v. *Sixty Acres of Land*, 28 F. Supp. 368 (E. D. Ill.) (public cemeteries); *United States* v. *Forty Acres of Land*, 24 F. Supp. 329 (D. Idaho) (school lands); *United States* v. *City of Tiffin*, 190 Fed. 279 (N. D. Ohio) (public alley).

> public use that is within its federal sovereign powers, it must have the right to appropriate that land. Otherwise, the owner of the land, by refusing to sell it or by consenting to do so only at an unreasonably high price, is enabled to subordinate the constitutional powers of Congress to his personal will. * * *
>
> * * * The principle of federal supremacy, so well expressed in the *Kohl* case [see *supra*, p. 18], argues against * * * subordination of the decisions of federal representatives to those of individual grantors or local officials as to the means of carrying out an admittedly federal governmental function. * * *
>
> The considerations that made it appropriate for the Constitution to declare that the Constitution of the United States, and the laws of the United States made in pursuance thereof, shall be the supreme law of the land [citing U. S. Const., Art. VI.] make it appropriate to recognize that the power of eminent domain, when exercised by Congress within its constitutional powers, is equally supreme. * * *

There is, thus, no doubt that the state-owned Mossyrock fish hatchery is subject to the federal eminent domain power; Section 21 of the Power Act (*supra*, pp. 17–18) is broad enough in terms to cover state as well as private property taken by a licensee. And whether exercised by the United States directly or through a licensee or agent, the federal supremacy stressed in *Carmack* is equally effective. Very close to the present situation is *State of Missouri v. Union Electric Light & Power Co.*, 42 F. 2d 692 (W. D. Mo.), where the state sought to enjoin a licensee under the

Federal Power Act from constructing the authorized project because it would inundate many public highways, school districts, and a courthouse and jail. The court held, first, that Congress had delegated the federal power to the company through Section 21 of the Act (see p. 34, n. 15 *supra*). Considering whether the federal eminent domain embraced property already dedicated to a public use, the court commented (42 F. 2d at 698):

> * * * the proposed improvements could not be accomplished, except through the exercise, if necessary, of eminent domain against property already dedicated to public use. To deny the right of eminent domain as against this public property would not only defeat the functions of the national government, but would run contrary to the obvious intent of the Congress as expressed in the Water Power Act. * * *

2. Of course, state-owned land cannot be taken by federal eminent domain unless it is for a federal public use. In *United States v. Carmack*, 329 U. S. 230 (*supra*, pp. 39–40), the state site was condemned by the Federal Works Administrator and the Postmaster General under their general authority to select and condemn land for post offices and customs houses. The Court satisfied itself that a federal use was involved (329 U. S. at 239):

> * * * While the federal power of eminent domain is limited to taking property for federal public use, the question of the existence of a federal public use presents no difficulty here

> because the constitutional power of Congress to establish post offices is express. * * * [20]

In the instant case, as well, the Federal Power Act's licensing procedures assure that "the question of the existence of a federal public use presents no difficulty." The exclusive authority of the Federal Power Commission over the development of the Cowlitz River is undeniable. *First Iowa Coop.* v. *Federal Power Commission*, 328 U. S. 152; *United States* v. *Appalachian Power Co.*, 311 U. S. 377. Furthermore, as we have shown, *supra*, pp. 22, 34–35, the Commission's award of the license to Tacoma was directly pursuant to the Act.

The license granted to Tacoma designated "[a]ll lands constituting the project area and enclosed by the project boundary" (R. 42), including the area

[20] The Court amplified this point, as follows (329 U. S. at 242):

> The foregoing establishes the principle of the supremacy of a federal public use over all other uses in a clearly designated field such as that of establishing post offices. The Government here contends that the officials designated by Congress have been authorized by Congress to use their best judgment in selecting post office sites. It contends also that if the officials so designated have used such judgment, in good faith, in selecting the proposed park site in spite of its conflicting local public uses, the Federal Works Administrator has express authority to direct the condemnation of that site. We agree with those contentions. * * *

It appears, therefore, that when an undoubted federal function is exercised to take lands for public use, the federal supremacy is effective against any prior state use. See pp. 39–40, *supra*. In the instant case, in any event, there is no doubt that the proposed federal use is superior in value and importance. See p. 44, *infra*.

to be inundated. It is therefore, clearly established that these lands, to use the language of Section 21 of the Power Act, are—

> * * * necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with an improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce * * *

Cf. *Oklahoma* v. *Guy F. Atkinson Co.*, 313 U. S. at 510-11. Such necessity to carry out a specific federal project, in turn, establishes the federal purpose. Since the licensed development "could not be accomplished except through the exercise * * * of eminent domain against property already dedicated to public use", the taking of such property is necessarily implied in Congress' delegation of the federal power in Section 21. *State of Missouri* v. *Union Electric Light & Power Co.*, 42 F. 2d 692, 698 (W. D. Mo.); *City of Davenport* v. *Three-Fifths of an Acre of Land*, 147 F. Supp. 794, 799-800 (S. D. Ill.); *United States* v. *Sixty Acres of Land*, 28 F. Supp. 368, 373 (E. D. Ill.). Cf. *United States* v. *South Dakota*, 212 F. 2d 14, 16 (C. A. 8).[21]

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[21] In *United States* v. *Gettysburg Electric Ry. Co.*, 160 U. S. 668, this Court observed that the federal government is likely to exercise the power of eminent domain more carefully than a private corporation to whom the power is delegated and that, consequently, in the latter case, "the presumption that the in-

3. Should the comparative importance of the old and new public uses be significant (see *United States v. Carmack*, 151 F. 2d 881 (C. A. 8), reversed, 329 U. S. 230; *supra*, pp. 39–40; n. 20, p. 42) the circumstances of this case establish the propriety of exercising the federal eminent domain power against the state property here. If Tacoma cannot take 61.63 acres of the fish hatchery, it will be unable to construct the extensive project licensed by the Commission which would go a long way toward alleviating the power shortage in the Pacific Northwest, and provide other benefits, carrying out comprehensive development of our water resources. See *supra*, pp. 4–5. On the other hand, if Tacoma can condemn the lands on which the fish hatchery is now located, the hatchery can, at a relatively small cost, be relocated within a short distance of the present site (see *supra*, pp. 9, 16). If a comparison of the relative importance of the two public uses is appropriate, the balance would clearly swing in favor of condemnation for the federal project.

B. THE ALLEGED RULE OF WASHINGTON LAW LIMITING CONDEMNATION OF PROPERTY DEDICATED TO PUBLIC USE DOES NOT SUPPORT THE DECISION BELOW

The state court relies upon an asserted rule of Washington law that the power or capacity of immune

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tended use for which the corporation proposes to take the land is public, is not so strong * * *" (329 U. S. at 680.) The Court did not thereby question the supremacy of the delegated federal power over a prior state use, but merely suggested that such delegated exercise of the power to a private party would be examined more closely, to be positive that the taking is indeed connected with a federally authorized public use, and not for a private purpose. See also *United States v. Parker*, 315 U. S. 275, 279 ff.

palities to take by eminent domain does not extend to state property dedicated to a public use, unless expressly so provided by the state legislature (R. 282–84). But this alleged rule does not support the court's holding in this case.

1. In the first place, such an asserted limitation is "really only a rule of construction of the terms of the grant" of state condemnation power (*United States* v. *Certain Parcels of Land*, 30 F. Supp. 372, 378 (D. Md.); see *infra*, pp. 48–49). Since, under its federal license, Tacoma is exercising the independent federal power, the state rule is irrelevant. See Points I, II, and III, A, *supra*, p. 17, *et seq.*

2. Furthermore, there appears to be no substantial basis in previous Washington authorities for the theory of the court below that the state rule purports to restrict the inherent capacity of municipalities, and that, therefore, state law forbids Tacoma from acting under a delegation of federal power. Tacoma undoubtedly has the general statutory capacity under state law to condemn needed land in connection with its electric utility business, including its operation of hydroelectric projects. Rev. Code Wash. (1954), 80.40.050, 8.12.030, 35.22.280 (6), 35.84.010–35.84.030, 80.40.010, Appendix, *infra*, pp. 53–58. See also pp. 22–23, *supra*. The grant of such condemnation power for electric power purposes, although in general terms, has been held to extend to state-owned lands and to power facilities already operated by public service corporations. *Tacoma* v. *State*, 121 Wash. 448; *Tacoma* v. *Nisqually Power Co.*, 57 Wash. 420.

Far from distinguishing between "capacity" and "power," the prior Washington decisions, including those cited by the court below, assume the existence of capacity once power or authority has been granted. Thus not only do the court's quotations from Lewis on *Eminent Domain* and 91 L. Ed. 259 (see R. 282–83) both deal with the power of state agencies under a delegation from the state, not their capacity, but *State* v. *Superior Court*, 91 Wash. 454, and *Seattle & Montana Ry. Co.* v. *State*, 7 Wash. 150 (R. 283–84), similarly are phrased in terms of power, and not capacity.[22] Both these cases concerned the authority of railroads to condemn (under state statutes) property already dedicated to public use, and they merely held that the statutes did not confer power to condemn such property. These rulings plainly are not denials of capacity, once authority is shown to have been granted by the state or federal government.

Particularly pertinent is *Tacoma* v. *State*, 121 Wash. 448, *supra*, cited by the court below in its opinion on the prior appeal (R. 90). In that case, Tacoma sought to condemn certain lands and interests in connection with its construction of another hydroelectric plant. Among this property were (1) a so-called "eyeing station" which the state owned and claimed that it intended to use as a fish hatchery, (2) some of the waters passing a state-owned fish hatchery then in use, (3) a portion of the lands within a school section

[22] In *State* v. *Superior Court*, *supra*, the Washington court stated (91 Wash. at 461): "In the case before us, the question is solely one of power. The question is whether the state has granted to railway companies the right to condemn land which it has reserved and set apart for a public use."

owned by the state, and (4) waters presently used by fish for propagation. In upholding the condemnation by the city, the Washington court expressed no concern over Tacoma's capacity to condemn but considered the substantiality of the alleged prior public use and the relative public benefits from the competing uses. See 121 Wash. at 452-454.

Thus, as to the "eyeing station," the court commented (121 Wash. at 452):

> The mere fact that the state owns the property and has the right and power to devote it to a public use is not sufficient to prevent the city from diverting the water therefrom, under the broad powers conferred upon cities by our statute, Rem. Compiled Statutes, § 9488, or, in any event, the unfulfilled purpose of the state, indefinite as to time and conditions, must, under § 4, ch. 117, p. 488, Laws of 1917 (Rem. Comp. Stat., § 7354), give way to the immediate and definite use proposed by the city.

Similarly, as to the diversion of water past the fish hatchery, the court noted (121 Wash. at 453):

> * * * It may be, as contended by the state, that from the fact that condemnation is sought will flow the presumption of damage to the owner, but if so it may be only because water is taken which is not used or necessary to be used in carrying out the public purpose to which the property is devoted. However that may be, the evidence disclosed by the record is sufficient to overcome any presumptions, and preponderates to the effect that, after the proposed diversion, there will be ample water in the main stream for the use of the hatchery, and that the diversion will even be a benefit to the hatchery, in that it will reduce the flow in times of high water, which now causes damage. * * *

And, in the same vein, the court held as to the waters used for fish propagation (*id.* at 453-454):

> The contention that the diversion of the waters will destroy or seriously damage the propagation of food fish, we cannot find to be sustained by a preponderance of the evidence. But even if it were, we would be reluctant to

Accordingly, when Tacoma receives a delegation of condemnation power from the federal government, as in the instant case, the previous Washington authorities do not suggest any inherent incapacity to execute that delegation. The state court has, moreover, previously indicated its understanding of the obvious fact that licensees under the Power Act do receive powers from the United States. See R. 65–92; *State ex rel. Washington Water Power Co.* v. *Superior Court*, 34 Wn. 2d 196, 203–04, appeal dismissed, 339 U. S. 907; *Great Northern R. Co.* v. *Washington Electric Co.*, 197 Wash. 627, 641.[24]

Indeed, the policy behind the rule of Washington law regarding prior public use—relied on by the opinion below—demonstrates that it does not rest on any "lack of capacity" which would interfere with federal functions. As a number of federal decisions have observed, strict construction of state grants of eminent domain aims at retaining in the state legislature the ultimate right to decide between competing uses authorized by it, unless already expressly provided. *United States* v. *Jotham Bixby Co.*, 55 F. 2d 317, 318–20, affirmed, *sub nom. C. M. Patten & Co.* v. *United States*, 61 F. 2d 970 (C. A. 9), vacated as

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hold that the fish, by following their natural instincts, had devoted the stream to such a public purpose as would defeat the city's rights under the statutes hereinbefore cited

[24] Moreover, the commentators cited by the court below in support of state limitations upon municipalities also recognize, of course, the existence of an independent federal power of eminent domain. See 11 McQuillin, *Municipal Corporations*, Sec. 32.09; Lewis, *Eminent Domain*, Sec. 367; Annotation, 91 L. Ed. 221, 222–36. See also Nichols on *Eminent Domain*, Secs. 1.24, 2.113, 2.21, 2.13, 2.131, 2.15.

moot, 289 U. S. 705; *United States* v. *City of Tiffin*, 190 Fed. 279, 281 (N. D. Ohio); *United States* v. *.8677 Acre of Land*, 42 F. Supp. 91, 96 (E. D. S. C.); *United States* v. *Certain Parcels of Land*, 30 F. Supp. 372, 378–79 (D. Md.); *United States* v. *Sixty Acres of Land*, 28 F. Supp. 368, 372–73 (S. D. Ill.). Since it merely reserves the legislative power to the legislature, the rule applies only against *delegates of state power*. It has no effect against the sovereign itself; a prior public use authorized by the state cannot prevent subsequent state legislative condemnation (see R. 282–83). A *fortiori*, a use authorized by the state cannot block the exercise of the superior sovereign power of the Federal Government either directly or through its agents.[25]

Finally, even if Washington law were clearly that Tacoma has capacity to take delegations of eminent domain power from the state, but not from the United States, no such discrimination against the federal government could stand. Cf. *Testa* v. *Katt*, 330 U. S. 386, 394. Regardless of state law, as we have shown in Point II, and Point III, A, *supra*, the United

[25] Therefore, even if congressional delegations of the eminent domain power are similarly to be strictly construed as against prior public uses (see *United States* v. *Carmack*, 329 U. S. at 243, n. 13), the discussion in the text shows that this should protect only competing public uses authorized by the same sovereign—*i. e.*, by the Federal Government—which would present "others exercising equal or greater public powers" (*ibid.*). It would present no problem in this case, since the license awarded Tacoma shows that the power to condemn the hatchery was "necessarily implied" (*ibid.*). As regards a competing use authorized by a state, the only question is whether the intended use by the federal delegate is indeed an authorized public use. See *supra*, n. 21, p. 43; n. 20, p. 42.

States may choose a state entity to execute a federal program and grant it sufficient power. Here, therefore, Tacoma could condemn the state fish hatchery in order to carry out its license under the Federal Power Act.

CONCLUSION

We respectfully submit that the decision below should be reversed.

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APPENDIX

1. The Federal Power Act, 41 Stat. 1063, *et seq.*, as amended, 16 U. S. C. 791, *et seq.*, provides in pertinent part:

SECTION 3, 16 U. S. C. 796:

The words defined in this section shall have the following meanings for purposes of this Act, to wit:

* * * * *

(5) "licensee" means any person, State, or municipality licensed under the provisions of section 4 of this Act, and any assignee or successor in interest thereof;

* * * * *

(7) "municipality" means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power;

* * * * *

SECTION 7, 16 U. S. C. 800:

(a) In issuing preliminary permits hereunder or licenses where no preliminary permit has been issued and in issuing licenses to new licensees under section 15 hereof the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region; and as between other applicants, the Commission may give

preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans.

* * * * *

SECTION 9, 16 U. S. C. 802:

That each applicant for a license hereunder shall submit to the commission—

* * * * *

(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this Act.

* * * * *

SECTION 10, 16 U. S. C. 803:

All licenses issued under this Part shall be on the following conditions:

* * * * *

(e) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission * * * *Provided further*, That licenses for the development, transmission, or distribution of power by States or municipalities shall be issued and enjoyed without charge to the extent such power is sold to the public without profit or is used by such State or municipality for State or municipal purposes, except that as to projects constructed or to be constructed by States or municipalities primarily designed to provide or improve navigation, licenses therefor shall be issued without charge; * * *

* * * * *

SECTION 21, 16 U. S. C. 814:

That when any licensee can not acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with an improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided*, That United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

2. The Revised Code of Washington (1951) provides in pertinent part:

SECTION 8.12.030:

CONDEMNATION AUTHORIZED—PURPOSES ENUMERATED. Every city and town and each unclassified city and town within the state of Washington, is hereby authorized and empowered to condemn land and property, including state, county and school lands and property for streets, avenues, alleys, highways; bridges, approaches, culverts, drains, ditches, public squares, public markets, city and town halls, jails and other public buildings, and

for the opening and widening, widening and extending, altering and straightening of any street, avenue, alley or highway, and to damage any land or other property for any such purpose or for the purpose of making changes in the grade of any street, avenue, alley or highway, or for the construction of slopes or retaining walls for cuts and fills upon real property abutting on any street, avenue, alley or highway now ordered to be, or such as shall hereafter be ordered to be opened, extended, altered, straightened or graded, or for the purpose of draining swamps, marshes, tidelands, tide flats or ponds, or filling the same, within the limits of such city, and to condemn land or property, or to damage the same, either within or without the limits of such city for public parks, drives and boulevards, hospitals, pesthouses, drains and sewers, garbage crematories and destructors and dumping grounds for the destruction, deposit or burial of dead animals, manure, dung, rubbish, and other offal, and for aqueducts, reservoirs, pumping stations and other structures for conveying into and through such city a supply of fresh water, and for the purpose of protecting such supply of fresh water from pollution, and to condemn land and other property and damage the same for such and for any other public use, after just compensation having been first made or paid into court for the owner in the manner prescribed by this chapter.

SECTION 35.22.280:

SPECIFIC POWERS ENUMERATED. Any city of the first class shall have power

* * * * * *

(6) To purchase or appropriate private property within or without its corporate limits, for its corporate uses, upon making just compensation to the owners thereof, and to institute and maintain such proceedings as may be authorized by the general laws of the state for the

appropriation of private property for public use;

* * * * *

(15) To provide for lighting the streets and all public places, and for furnishing the inhabitants thereof with gas or other lights, and to erect, or otherwise acquire, and to maintain the same, or to authorize the erection and maintenance of such works as may be necessary and convenient therefor, and to regulate and control the use thereof;

* * * * * *

SECTION 35.84.010:

ELECTRIC ENERGY—SALE OF—PURCHASE. Every city or town owning its own electric power and light plant, shall have the right to sell and dispose of electric energy to any other city or town, public utility district, governmental agency, or municipal corporation, mutual association, or to any person, firm, or corporation, inside or outside its corporate limits, and to purchase electric energy therefrom.

SECTION 35.84.020:

ELECTRIC ENERGY FACILITIES—RIGHT TO ACQUIRE. Every city or town owning its own electric power and light plant may acquire, construct, purchase, condemn and purchase, own, operate, control, add to and maintain lands, easements, rights-of-way, franchises, distribution systems, substations, inter-tie or transmission lines, to enable it to use, purchase, sell, and dispose of electric energy inside or outside its corporate limits, or to connect its electric plant with any other electric plant or system, or to connect parts of its own electric system.

SECTION 35.84.030:

LIMITATION ON RIGHT OF EMINENT DOMAIN. Every city or town owning its own electric

power and light plant may exercise the power of eminent domain as provided by law for the condemnation of private property for any of the corporate uses or purposes of the city or town: *Provided*, That no city or town shall acquire, by purchase or condemnation, any publicly or privately owned electric power and light plant or electric system located in any other city or town except with the approval of a majority of the qualified electors of the city or town in which the property to be acquired is situated; nor shall any city or town acquire by condemnation the electric power and light plant or electric system, or any part thereof, belonging to or owned or operated by any municipal corporation, mutual, nonprofit, or cooperative association or organization, or by a public utility district.

SECTION 80.40.010:

AUTHORITY TO ACQUIRE AND OPERATE WATERWORKS. A city or town may construct, condemn and purchase, purchase, acquire, add to, maintain, and operate waterworks, within or without its limits, for the purpose of furnishing the city and its inhabitants, and any other persons, with an ample supply of water for all purposes, public and private, including water power and other power derived therefrom, with full power to regulate and control the use, distribution, and price thereof: *Provided*, That all water sold by a municipal corporation outside its corporate limits shall be sold at just and reasonable rates.

For such purposes any city or town may take, condemn and purchase, purchase, acquire, and retain water from any public or navigable lake or watercourse, surface or ground, and, by means of aqueducts or pipe lines, conduct it to the city or town; and it may erect and build dams or other works across or at the outlet of any lake or watercourse in this state for the

purpose of storing and retaining water therein up to and above high water mark; and for all the purposes of erecting such aqueducts, pipe lines, dams, or water works or other necessary structures in storing and retaining water, or for any of the purposes provided for by this chapter, the city or town may occupy and use the beds and shores up to the high water mark of any such watercourse or lake, and acquire the right by purchase, or by condemnation and purchase, or otherwise, to any water, water rights, easement or privileges named in this chapter, or necessary for any of said purposes, and the city or town may acquire by purchase or condemnation and purchase any properties or privileges necessary to be had to protect its water supply from pollution. Should private property be necessary for any such purposes or for storing water above high water mark, the city or town may condemn and purchase, or purchase and acquire such private property. No such dam or other structure shall impede, obstruct, or in any way interfere with public navigation of the lake or watercourse.

SECTION 80.40.050:

AUTHORITY TO ACQUIRE AND OPERATE UTILITIES. A city or town may also construct, condemn and purchase, purchase, acquire, add to, maintain, and operate works, plants, and facilities for the purpose of furnishing the city or town and its inhabitants, and any other persons, with gas, electricity, and other means of power and facilities for lighting, heating, fuel, and power purposes, public and private, with full authority to regulate and control the use, distribution, and price thereof, together with the right to handle and sell or lease any meters, lamps, motors, transformers, and equipment or accessories of any kind, necessary and convenient for the use, distribution, and sale thereof; authorize the construction of such plant or plants

by others for the same purpose, and purchase gas, electricity, or power from either within or without the city or town for its own use and for the purpose of selling to its inhabitants and to other persons doing business within the city or town and regulate and control the use and price thereof.

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